

ESTTA Tracking number: **ESTTA628047**

Filing date: **09/18/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92059289
Party	Defendant Damo Textile
Correspondence Address	GEORGE BUSU LIM RUGER & KIM LLP 1055 W 7TH STREET , SUITE 2800 LOS ANGELES, CA 90017 UNITED STATES george.busu@limruger.com
Submission	Motion to Amend/Amended Answer or Counterclaim
Filer's Name	George Busu, Esq.
Filer's e-mail	george.busu@limruger.com
Signature	/gbusu/
Date	09/18/2014
Attachments	M4L2FAA.pdf(3248097 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

D.J. BRONSON, INC.,

Petitioner,

v.

DAMO TEXTILE, INC.

Registrant.

Cancellation No.: 92059289

Mark: MASQUERADE

Reg. No.: 3,427,380

Reg. Date.: May 13, 2008

REGISTRANT DAMO TEXTILE, INC.'S MOTION FOR LEAVE TO AMEND ITS ANSWER

Pursuant to 37 C.F.R. § 2.115 and Fed.R.Civ.P. 15, Registrant Damo Textile, Inc. ("Registrant"), hereby requests leave to file an amended answer to Petitioner D.J. Bronson, Inc.'s ("Petitioner") petition for cancellation. The proposed amended answer would simply add a statute of limitations affirmative defense.

Petitioner filed its petition for cancellation herein more than five years after the date of registration of the challenged registration. Accordingly, justice requires granting leave to amend because the statute of limitations defense is dispositive of Petitioner's claim for cancellation on the ground of likelihood of confusion. Moreover, the proposed amended answer would not prejudice Petitioner because this proceeding is in its very early stages and Petitioner received early notice that Registrant would assert this defense.¹

¹ This motion is brought out of abundance of caution, because, while Petitioner has indicated it is considering Registrant's request for a stipulation for leave to amend, Petitioner has not yet indicated whether it will so stipulate.

I. STATEMENT OF FACTS

Registrant's MASQUERADE trademark, Registration No. 3,427,380 (the '380 Registration") registered on the Principal Register on May 13, 2008. [A true and correct copy of the '380 Registration is attached as exhibit 1 hereto].

More than six years later, on June 4, 2014, Petitioner filed its petition for cancellation herein. Forty days thereafter, on July 14, 2014, Registrant timely filed its answer to the petition. The answer did not specifically assert a statute of limitations defense.

On August 13, 2014, the parties timely participated in the Discovery Conference. The very next day, Petitioner was placed on notice that Registrant intends to assert a statute of limitations defense via email from Registrant's counsel, stating in part: "your Petition does not state a claim upon which relief can be granted as it is time-barred because it was filed more than 5-years after Damo's registration registered...." [A true and correct copy of said email is attached as exhibit 2 hereto].

Five days thereafter, on August 19, 2014, Registrant's counsel sent an email to Petitioner's counsel, asking whether Petitioner would stipulate to the filing of an amended answer. The email attached a redline of the proposed amended answer and made clear that "the only substantive change is the addition of a seventh affirmative defense for statute of limitations." [A true and correct copy of said email is attached as exhibit 3 hereto].

Over the next couple of weeks, counsel for the parties engaged in several email communications, whereby counsel for Petitioner stated it would consider the requested stipulation, but that counsel would need to confer with Petitioner's principal who "is and

has been in China in the recent past. As soon as I am able to discuss the request with him I will be in touch.” [A true and correct copy of said email string is attached as exhibit 4 hereto].

II. ARGUMENT

Pleadings in a cancellation proceeding may be amended in the same manner as in a civil action in a United States district court. 37 C.F.R. § 2.115. Under Fed.R.Civ.P. 15(a)(2), “The court should freely give leave when justice so requires.” In applying this standard, “the Board liberally grants leave to amend pleadings at any stage of a proceeding when justice so requires, unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party or parties.” TBMP § 507.02.

Petitioner could not possibly be prejudiced by the proposed amendment which does nothing more than add a seventh affirmative defense for statute of limitations. [Attached as exhibit 5 hereto is a redline of the original answer showing all of the proposed changes thereto.] This proceeding is in its early stages and has so far proceeded without any delays. Registrant timely answered the petition for cancellation 40 days after it was filed (without any request for extension) and the parties timely held the Discovery Conference on August 13, 2014. The very next day, Registrant provided written notice to Petitioner indicating that it would assert the statute of limitations defense. Five days after that, Registrant’s counsel emailed a redline of the proposed amended answer and asked whether Petitioner would stipulate to the filing thereof. So far, Petitioner has not even stated that it would oppose the filing of the proposed amended answer. The only communications from Petitioner’s counsel on this topic indicate that they are still considering it. See, Exhibit 4.

In contrast, Registrant would be severely prejudiced if it is not permitted to assert a statute of limitation defense this early in the proceedings. The petition for cancellation undoubtedly relies on likelihood of confusion as grounds for cancellation by stating "Respondent's alleged mark is confusingly similar to Petitioner's mark MASQUERADE for said goods." Petition for Cancellation, at ¶ 13. Under 15 U.S.C. 1064(1), this claim is time-barred because the petition for cancellation was indisputably filed more than five years after the '380 Registration registered. This point is made clear by the TBMP, which states unequivocally that "a petitioner may not seek to cancel a Principal Register registration over 5 years old on the ground of likelihood of confusion." TBMP § 307.02(a). There could hardly exist a greater prejudice to Registrant than the inability to assert a dispositive affirmative defense based on undisputed facts that can be discerned merely by reference to the records of the Trademark Office.

III. CONCLUSION

Based on the foregoing, Registrant respectfully requests leave to file its proposed amended answer, in the form of attached exhibit 6 hereto.

Dated: September 18, 2014

LIM, RUGER & KIM, LLP

By: 

George Busu (Calif. Bar No.: 235993)
1055 W. 7th Street, Suite 2800
Los Angeles, CA 90017
Tel: (213) 955-9500
Fax: (213) 955-9511
Email: george.busu@limruger.com

Attorneys for Registrant, Damo Textile, Inc.

EXHIBIT 1

EXHIBIT 1

Int. Cl.: 25

Prior U.S. Cls.: 22 and 39

United States Patent and Trademark Office

Reg. No. 3,427,380

Registered May 13, 2008

TRADEMARK
PRINCIPAL REGISTER

MASQUERADE

DAMO TEXTILE (CALIFORNIA CORPORATION)
1951 STAUNTON AVE.
LOS ANGELES, CA 90058

FIRST USE 1-1-2008; IN COMMERCE 1-1-2008.

FOR: BLOUSES; BODY SUITS; BRAS; BRIEFS;
CAMISOLES; CROP TOPS; DRESSES; JACKETS;
JEANS; LOUNGEWEAR; OVERALLS; PAJAMAS;
PANTIES; PANTS; POLO SHIRTS; SHORTS; SKIRTS;
SLEEPWEAR; SWEAT PANTS; SWEAT SHIRTS; T-
SHIRTS; TANK TOPS; UNDERSHIRTS; UNDER-
WEAR, IN CLASS 25 (U.S. CLS. 22 AND 39).

THE MARK CONSISTS OF STANDARD CHAR-
ACTERS WITHOUT CLAIM TO ANY PARTICULAR
FONT, STYLE, SIZE, OR COLOR.

SN 77-005,252, FILED 9-22-2006.

LYDIA BELZER, EXAMINING ATTORNEY

EXHIBIT 2

EXHIBIT 2

George Busu

From: George Busu
Sent: Thursday, August 14, 2014 4:00 PM
To: 'Alison Grabell'
Cc: Robert Ezra; Bryan Sheldon
Subject: RE: MASQUERADE - Cancellation No. 92059289; Discovery Conference and Protective Order

Alison,

I am exceedingly disappointed by your email. It is one-sided, misrepresents what I said, and appears to try to set up some sort of waiver argument. I will address each portion of your email below and the numbered paragraphs correspond to the paragraphs in your email.

1) To be as clear as possible, I did not, nor could I, "admit" that your client has priority over my client. It is beyond my comprehension why you could believe I made such admission (or that I could make such admission) during our very first talk and before the parties conducted any discovery. Also, to be as clear as possible, as stated in its Answer, Damo reserves its right to state any and all applicable affirmative defenses and waives none. For instance, and without limitation, your Petition does not state a claim upon which relief can be granted as it is time-barred because it was filed more than 5-years after Damo's registration registered and your fraud claim is improperly pled.

2) I agree that we discussed resolution of the matter, I disagree that it was in good faith because of your raising the possibility of an infringement action against Damo. I remind you that Damo owns a registration of the mark on the principal register and your client does not.

3) Agreed.

4) I will get back to you on this.

5) Agreed.

Finally, your last comment that "In addition, as we discussed, we will serve discovery." is entirely one-sided. We also discussed that Damo will conduct discovery. It is beside the point that Bob thinks Damo's discovery would be "irrelevant".

George T. Busu



LIM, RUGER & KIM, LLP
1055 West Seventh Street, Suite 2800 | Los Angeles, CA 90017
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george.busu@limruger.com | www.limruger.com

This message and any attached documents may contain information that is confidential and/or privileged. If you have received this transmission in error, please notify the sender immediately by reply email and then delete this message.

From: Alison Grabell [<mailto:agrabell@ebg-law.com>]
Sent: Wednesday, August 13, 2014 6:28 PM

To: George Busu

Cc: Robert Ezra

Subject: MASQUERADE - Cancellation No. 92059289; Discovery Conference and Protective Order

George,

We appreciated holding the telephonic discovery conference with you today in the MASQUERADE Cancellation.

First, as discussed, please find the TTAB's Standard Protective Order. Kindly return a pdf of the fully executed Order to me.

I confirm that we discussed the following during the discovery conference:

1. Claims/Defenses

DJ Bronson claims priority of use of the MASQUERADE mark.

Damo Textiles admits that it does not have priority as to DJ Bronson.

Damo Textiles may assert equitable defenses.

DJ Bronson disputes the equitable defenses.

2. Potential for Settlement

Resolution of the proceeding, including voluntary surrender of Damo Textile's Registration No. 3427380 and an agreement between the parties. We suggested a license and co-existence agreement. You suggested a co-existence agreement.

3. Preservation of documents and evidence

Parties have been advised of litigation hold.

4. Standard Protective Order

Stipulated.

5. Agreement to e-mail service

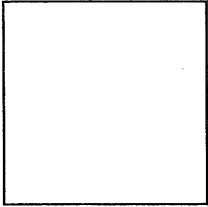
In addition, as discussed, we will serve discovery.

Please let me know if your understanding of our discussion differs from the above.

The best way to reach me is by e-mail or on my cell phone, at (818) 915-5680.

Regards,

Alison



Alison Grabell, Esq.

Ezra Brutzkus Gubner LLP
21650 Oxnard St., Suite 500
Woodland Hills, CA 91367-4911

818-827-9000 Main
818-827-9139 Direct
818-915-5680 Cell
818-827-9031 Fax
agrabell@ebg-law.com
www.ebg-law.com

The preceding e-mail message is subject to Ezra Brutzkus Gubner LLP's e-mail policies, which can be found at: <http://www.ebg-law.com/disclaimer>

EXHIBIT 3

EXHIBIT 3

George Busu

From: George Busu
Sent: Tuesday, August 19, 2014 4:27 PM
To: 'Alison Grabell'
Cc: Robert Ezra
Subject: Damo Textile, Inc. v. D.J. Bronson, Inc (request to stipulate to amended answer)
Attachments: [Proposed] Amended Answer (00939584).PDF

Dear Ms. Grabell,

Damo Textile, Inc. will seek leave to file an amended answer to D.J. Bronson, Inc's petition for cancellation.

The proposed amended answer is attached hereto as a redline of the original answer. As you can see, the only substantive change is the addition of a seventh affirmative defense for statute of limitations. Otherwise, the former seventh affirmative defense has been renumbered and is now the eighth affirmative defense.

I hereby request that you stipulate to the filing of the amended answer. Please let me know as soon as possible whether you so stipulate.

Thanks in advance for your anticipated prompt attention to this matter,

Best regards,

George T. Busu



Los Angeles | San Francisco

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Phone: 213.955.9500 X161 | Fax: 213.955.9511
george.busu@limruger.com | www.limruger.com

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EXHIBIT 4

EXHIBIT 4

George Busu

From: Robert Ezra [bezra@ebg-law.com]
Sent: Tuesday, September 02, 2014 2:22 PM
To: George Busu; Alison Grabell
Subject: RE: Damo Textile, Inc. v. D.J. Bronson, Inc (request to stipulate to amended answer)

Follow Up Flag: Follow up
Flag Status: Flagged

George, you can expect regular professional courtesies from our office. In the request at hand I feel I need to get my client approval after discussion with him. Unfortunately he is and has been in China in the recent past. As soon as I am able to discuss the request with him I will be in touch.



Robert Ezra, Esq.

Ezra Brutzkus Gubner LLP
21650 Oxnard St., Suite 500
Woodland Hills, CA 91367-4911

818-827-9000 Main
818-827-9105 Direct
818-827-9017 Fax
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www.ebg-law.com

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From: George Busu [mailto:george.busu@limruger.com]
Sent: Tuesday, September 02, 2014 2:15 PM
To: Alison Grabell
Cc: Robert Ezra
Subject: RE: Damo Textile, Inc. v. D.J. Bronson, Inc (request to stipulate to amended answer)

Hi Alison,

It has been almost two weeks now since you indicated that you would respond to my request that you stipulate to Damo's filing of an amended answer. If I do not hear from you by the end of business day tomorrow, I will understand that to mean that you do not agree to stipulate as requested. In that case, Damo will file a motion with the TTAB requesting leave to amend its answer. Thanks.

Best,

George T. Busu



LIM, RUGER & KIM, LLP
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george.busu@limruger.com | www.limruger.com

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From: George Busu
Sent: Tuesday, August 26, 2014 5:35 PM
To: 'Alison Grabell'
Cc: Robert Ezra
Subject: RE: Damo Textile, Inc. v. D.J. Bronson, Inc (request to stipulate to amended answer)

Hi Alison,

A reminder about the below email. I would like a response at your earliest convenience. Thanks.

Best,

George T. Busu



LIM, RUGER & KIM, LLP
1055 West Seventh Street, Suite 2800 | Los Angeles, CA 90017
Phone: 213.955.9500 X161 | Fax: 213.955.9511
george.busu@limruger.com | www.limruger.com

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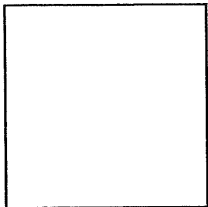
From: Alison Grabell [<mailto:agrabell@ebg-law.com>]
Sent: Wednesday, August 20, 2014 5:14 PM
To: George Busu
Cc: Robert Ezra
Subject: RE: Damo Textile, Inc. v. D.J. Bronson, Inc (request to stipulate to amended answer)

Dear George,

We are considering your request and will respond.

Regards,

Alison



Alison Grabell, Esq.

Ezra Brutzkus Gubner LLP
21650 Oxnard St., Suite 500
Woodland Hills, CA 91367-4911

818-827-9000 Main
818-827-9139 Direct
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From: George Busu [<mailto:george.busu@limruger.com>]
Sent: Tuesday, August 19, 2014 4:27 PM
To: Alison Grabell
Cc: Robert Ezra
Subject: Damo Textile, Inc. v. D.J. Bronson, Inc (request to stipulate to amended answer)

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The proposed amended answer is attached hereto as a redline of the original answer. As you can see, the only substantive change is the addition of a seventh affirmative defense for statute of limitations. Otherwise, the former seventh affirmative defense has been renumbered and is now the eighth affirmative defense.

I hereby request that you stipulate to the filing of the amended answer. Please let me know as soon as possible whether you so stipulate.

Thanks in advance for your anticipated prompt attention to this matter,

Best regards,

George T. Busu



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EXHIBIT 5

EXHIBIT 5

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

D.J. BRONSON, INC.,
Petitioner,
v.
DAMO TEXTILE, INC.
Registrant.

Cancellation No.: 92059289

Mark: MASQUERADE

Reg. No.: 3,427,380

Reg. Date.: May 13, 2008

Field Code Changed

FIRST AMENDED ANSWER TO PETITION FOR CANCELLATION

Registrant Damo Textile, Inc. ("Registrant"), by and through its undersigned counsel, hereby responds to the Petition for Cancellation ("Petition") of petitioner D.J. Bronson, Inc. ("Petitioner").

As to the unnumbered preface paragraphs, Registrant responds:

Registrant lacks sufficient information and belief as to whether Petitioner is a corporation of the State of California, with an address of 5401 Telegraph Road, Commerce, CA 90040, and on that basis denies said allegations. Registrant admits that Petitioner believes it is being damaged by and will continue to be damaged by the continued registration of the registered MASQUERADE mark ("Registered Mark") shown in U.S. Trademark Registration No.: 3,427,380 ("380 Registration"), but Registrant denies that Petitioner's apparent belief is warranted or that Petitioner is actually being damaged or will be damaged by the continued registration of the Registered Mark. Registrant admits that it owns the 380 Registration.

Registrant admits that Petitioner seeks to cancel the 380 Registration pursuant to the Trademark Act, but denies that there exist any valid grounds for doing so.

As to the numbered subsequent paragraphs, Registrant responds:

1. Registrant denies the allegations of paragraph 1 of the Petition.
2. Registrant lacks sufficient information and belief as to the allegations in paragraph 2 of the Petition, and on that basis denies said allegations.
3. Registrant lacks sufficient information and belief as to the allegations in paragraph 3 of the Petition, and on that basis denies said allegations.
4. Registrant admits the allegations of paragraph 4 of the Petition.
5. Registrant denies the allegations of paragraph 5 of the Petition.
6. Registrant lacks sufficient information and belief as to the allegations in paragraph 6 of the Petition, and on that basis denies said allegations.
7. Registrant lacks sufficient information and belief as to the allegations in paragraph 7 of the Petition, and on that basis denies said allegations.
8. Registrant lacks sufficient information and belief as to the allegations in paragraph 8 of the Petition, and on that basis denies said allegations.
9. Registrant denies the allegations of paragraph 9 of the Petition.

10. Registrant denies the allegations of paragraph 10 of the Petition.

11. Registrant lacks sufficient information and belief as to the allegations in paragraph 11 of the Petition, and on that basis denies said allegations.

12. Registrant lacks sufficient information and belief as to the allegations in paragraph 12 of the Petition, and on that basis and out of abundance of caution denies said allegations.

13. Registrant denies that Petitioner will be damaged as alleged. The allegation of confusing similarity is a legal conclusion and, accordingly, a response is not required. Registrant lacks sufficient information and belief as to the balance of the allegations in paragraph 13 of the Petition, and on that basis denies said allegations.

14. Registrant denies the allegations of paragraph 14 of the Petition.

15. Registrant denies the allegations of paragraph 15 of the Petition.

16. Registrant denies the allegations of paragraph 16 of the Petition.

AFFIRMATIVE DEFENSES

1. The Petition fails to state a claim upon which relief may be granted.

2. The claim set forth in the Petition is barred by the doctrine of laches. Registrant and Petitioner are competitors in the garment industry. Petitioner has had constructive notice,
{00939566.DOC}

and on information and belief has had actual notice, of the existence of the Registered Mark for years, but has waited until now to file its Petition without justification.

3. The claim set forth in the Petition is barred by the doctrine of estoppel. Registrant and Petitioner are competitors in the garment industry. Petitioner has had constructive notice, and on information and belief has had actual notice, of the existence of the Registered Mark for years, but has waited until now to file its Petition without justification.

4. The claim set forth in the Petition is barred by the doctrine of acquiescence. Registrant and Petitioner are competitors in the garment industry. Petitioner has had constructive notice, and on information and belief has had actual notice, of the existence of the Registered Mark for years, but has waited until now to file its Petition without justification.

5. The claim set forth in the Petition is barred by the doctrine of unclean hands. Registrant and Petitioner are competitors in the garment industry. Petitioner has had constructive notice, and on information and belief has had actual notice, of the existence of the Registered Mark for years, but has waited until now to file its Petition without justification.

6. Petitioner lacks standing to pursue the Petition because it has not and will not be damaged by the continued registration of the Registered Mark. Petitioner's damage, if any, results from Petitioner's own actions and/or inactions.

7. Some or all of the claims set forth in the Petition are barred by the applicable statute of limitations.

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8. Registrant reserves the right to assert additional affirmative defenses.

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WHEREFORE, Registrant requests denial or dismissal of the Petition as appropriate, and such other and further relief as may be just and proper.

Dated: August 19, 2014

LIM, RUGER & KIM, LLP

Deleted: July 14

By: _____

George Busu (Calif. Bar No.: 235993)
1055 W. 7th Street, Suite 2800
Los Angeles, CA 90017
Tel: (213) 955-9500
Fax: (213) 955-9511
Email: george.busu@limruger.com

Attorneys for Registrant, Damo Textile, Inc.

EXHIBIT 6

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

D.J. BRONSON, INC.,

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Registrant admits that Petitioner seeks to cancel the 380 Registration pursuant to the Trademark Act, but denies that there exist any valid grounds for doing so.

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3. Registrant lacks sufficient information and belief as to the allegations in paragraph 3 of the Petition, and on that basis denies said allegations.
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6. Registrant lacks sufficient information and belief as to the allegations in paragraph 6 of the Petition, and on that basis denies said allegations.
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8. Registrant lacks sufficient information and belief as to the allegations in paragraph 8 of the Petition, and on that basis denies said allegations.
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14. Registrant denies the allegations of paragraph 14 of the Petition.
15. Registrant denies the allegations of paragraph 15 of the Petition.
16. Registrant denies the allegations of paragraph 16 of the Petition.

AFFIRMATIVE DEFENSES

1. The Petition fails to state a claim upon which relief may be granted.
2. The claim set forth in the Petition is barred by the doctrine of laches. Registrant and Petitioner are competitors in the garment industry. Petitioner has had constructive notice,

and on information and belief has had actual notice, of the existence of the Registered Mark for years, but has waited until now to file its Petition without justification.

3. The claim set forth in the Petition is barred by the doctrine of estoppel. Registrant and Petitioner are competitors in the garment industry. Petitioner has had constructive notice, and on information and belief has had actual notice, of the existence of the Registered Mark for years, but has waited until now to file its Petition without justification.

4. The claim set forth in the Petition is barred by the doctrine of acquiescence. Registrant and Petitioner are competitors in the garment industry. Petitioner has had constructive notice, and on information and belief has had actual notice, of the existence of the Registered Mark for years, but has waited until now to file its Petition without justification.

5. The claim set forth in the Petition is barred by the doctrine of unclean hands. Registrant and Petitioner are competitors in the garment industry. Petitioner has had constructive notice, and on information and belief has had actual notice, of the existence of the Registered Mark for years, but has waited until now to file its Petition without justification.

6. Petitioner lacks standing to pursue the Petition because it has not and will not be damaged by the continued registration of the Registered Mark. Petitioner's damage, if any, results from Petitioner's own actions and/or inactions.

7. Some or all of the claims set forth in the Petition are barred by the applicable statute of limitations.

///

///

///

8. Registrant reserves the right to assert additional affirmative defenses.

WHEREFORE, Registrant requests denial or dismissal of the Petition as appropriate, and such other and further relief as may be just and proper.

Dated: September __, 2014

LIM, RUGER & KIM, LLP

By: _____

George Busu (Calif. Bar No.: 235993)
1055 W. 7th Street, Suite 2800
Los Angeles, CA 90017
Tel: (213) 955-9500
Fax: (213) 955-9511
Email: george.busu@limruger.com

Attorneys for Registrant, Damo Textile, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing REGISTRANT DAMO TEXTILE, INC.'S MOTION FOR LEAVE TO AMEND ITS ANSWER has been served on counsel for Petitioner by mailing said copy on September 18, 2014, via First Class Mail, postage prepaid as follows:

Robert Ezra
J. Alison Grabell
Ezra Brutzkus Gubner LLP
21650 Oxnard Street, Suite 500
Woodland Hills, CA 91367

By: 
George Busu Esq.